Appeal of the NFL Parties of the Special Master's Ruling
Regarding the Use of the Appeals Advisory Panel on Claim Appeals

The National Football League and NFL Properties LLC (the "NFL Parties") respectfully appeal, in part, the Special Master's September 28, 2018 decision regarding the use of the Appeals Advisory Panel on Claim Appeals (the "Special Master AAP Ruling"). The NFL Parties submit that the Special Master's failure to consult with the neutral Appeals Advisory Panel ("AAP") Members and Consultants ("AAPs" and "AAPCs")—as well as the Special Master's failure to reconsider certain appeal determinations with the assistance of AAPs and AAPCs in response to the NFL Parties' submissions—constitutes an abuse of discretion with respect to 17[1] claim appeals turning on technical medical issues where the Qualifying Diagnoses were rendered by Qualified MAF Physicians ("MAF Physicians")[2] later terminated from the program and/or severely criticized by AAPs for suspect methodologies and flawed diagnoses. The NFL Parties respectfully seek reconsideration of these 17 claim appeals, prior to payment, with the assistance of AAPs and AAPCs.

PRELIMINARY STATEMENT

The NFL Parties are committed to paying Monetary Awards for all Qualifying Diagnoses rendered pursuant to the diagnostic criteria set forth in the Settlement Agreement. While the Settlement Agreement grants the NFL Parties the right to appeal any Monetary Award, the NFL Parties do not do so lightly. In fact, after consultation with their expert medical advisors, the NFL Parties have appealed only 15% of all

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[1] Specifically, the NFL Parties appeal with respect to the claims of SPIDs 100000070, 100002497, 100002712, 100003221, 100004486, 100004715, 100004758, 100005721, 100006765, 100008030, 100008258, 100009422, 100013190, 100016955, 250002398, 950000043, and 950003710.

[2] For ease of reference, the NFL Parties shall refer to "MAF Physicians" when discussing neurologists approved to serve in the Settlement Program as diagnosing physicians either in their role as a Qualified MAF Physician or alternatively as a Qualified BAP Provider.

Monetary Awards approved to date by the Claims Administrator, and only in cases where there was clear and convincing evidence that the diagnosing physician erred by rendering a diagnosis that did not meet the diagnostic criteria negotiated by the Parties and approved by the Court.[3]

This is the issue: The Settlement Agreement provides this Court (and the Special Masters) with discretion to consult with AAPs and AAPCs in connection with appeals of claim determinations; however, given the technical medical issues involved, the NFL Parties are concerned that, on information and belief, the Special Master has failed to consult with an AAP or AAPC on *36 of 37 adjudicated appeals* the NFL Parties have brought with respect to Qualifying Diagnoses rendered by MAF Physicians.

MAF Physicians are hardly infallible. Indeed, several MAF Physicians who have provided a disproportionate number of Qualifying Diagnoses have since been terminated from the program by the Claims Administrator and/or harshly criticized by AAPs for questionable methodologies and incorrect diagnoses. The 17 claim appeals at issue here involve diagnoses by four such suspect MAF Physicians—Dr. Randolph Evans (criticized by AAPs and then terminated), Dr. Nicholas Suite (criticized by AAPs and then terminated) and partners Drs. Bruce Rubin and Kester Nedd (criticized by AAPs). Most of these appeals raise precisely the same technical diagnostic issues for which these MAF Physicians have been sharply criticized by the AAPs. Even though the Special Master has been made aware of the significant issues and criticisms regarding these MAF Physicians, the Special Master nevertheless failed to consult with an AAP or AAPC on any of these 17 appeals and rejected the NFL Parties' request that he reconsider these

[3] Specifically, out of 657 Monetary Awards approved by the Claim Administrators to date, the NFL Parties have appealed only 102.

appeals with their assistance. The NFL Parties submit that this constitutes a clear abuse of discretion.

For these reasons, and those set forth below, the NFL Parties respectfully request that, prior to payment, the Court order the reconsideration of these 17 claim appeals in consultation with an AAP and, where applicable, an AAPC.

FACTUAL BACKGROUND

A. The Role of the AAP Under the Settlement Agreement

The Settlement Agreement provides that, with respect to appeals by the Parties, the Court "may be assisted, in its discretion, by any member of the Appeals Advisory Panel and/or an Appeals Advisory Panel Consultant." (Settlement Agreement, § 9.8.) While the decision to seek such assistance is discretionary, the Parties to the Settlement Agreement made the AAPs and AAPCs a central part of the claim appeal process because they recognized that the Court or its designees (here, the Special Masters) would not be medical experts or have the medical training necessary to evaluate medical records and other technical medical issues. The AAP was created to advise the Court (and, by extension, the Special Masters) on issues requiring inherently technical medical expertise—as in any case where the Court retains experts to advise on technical issues. (*See id.*, § 2.1(g) (members of the Appeals Advisory Panel are "eligible to advise the Court or the Special Master with respect to medical aspects of the Class Action Settlement").) As the name of the Appeals Advisory Panel suggests, the goal in providing the Court and the Special Masters with such assistance was to ensure that appeals are correctly decided as a matter of medicine and to ensure that the Court and

Special Masters are not put in the position of having to evaluate diagnoses made by medical professionals without the benefit of proper medical expertise.[4]

The Parties selected the elite group of eight AAPs and three AAPCs based on their unquestionable expertise and stature in their respective fields and after conducting a stringent vetting process that included interviews. The eight AAPs are highly-skilled, leading neurologists who are incontestably qualified to evaluate the medical records and other materials submitted in Claim Packages and help the Special Master and Court determine on appeal whether a diagnosing physician properly rendered a Qualifying Diagnosis under the Settlement's negotiated and agreed-to diagnostic criteria (as opposed to what the diagnosing physician might otherwise believe merits compensation). Similarly, the AAPCs are leading neuropsychologists in the field who, like the AAPs, have unquestionable expertise in evaluating the neuropsychological testing results submitted in Claim Packages. The AAPs and AAPCs have the benefit of regular roundtable calls with each other and the Claims Administrator concerning the diagnostic questions central to the Settlement Program and, as a result of their role (including their mandatory review, to date, of hundreds of pre-Effective Date claims for the Claims Administrator), they have evaluated the work of dozens of diagnosing physicians across the spectrum of claims. The AAPs and AAPCs are true neutrals, with no ongoing contact with lawyers for claimants, Co-Lead Class Counsel or the NFL Parties.

[4] In addition to discretionary use of AAPs and AAPCs in the context of appeals, the Settlement Agreement identifies certain categories of claims where review by AAPs is compulsory—for example, in connection with the initial determination by the Claims Administrator of pre-Effective Date claims. (*See id*., § 6.4.)

B. The Qualified MAF Physicians

Although the Parties also approve each MAF Physician who participates in the Settlement Program, the vetting process bears no comparison to that used for the AAP. The Parties were (and remain) under significant pressure to provide immediate and adequate coverage of MAF Physicians across the country in order to implement the Settlement Program efficiently. To that end, the Parties have approved 235 MAF Physicians based on a limited review of the physicians' applications and resumes and without the benefit of interviews; to date, 140 of these physicians have signed contracts to participate in the Settlement Program. In terms of training, the Claims Administrator provides each contracted MAF Physician with a manual explaining the role and the Settlement's diagnostic criteria and has provided periodic alerts on various topics.[5]

The unquestionable across-the-board excellence of the elite group of AAPs and AAPCs contrasts with the widely varying quality of the MAF Physicians. Indeed, the Settlement Program's short history demonstrates that MAF Physicians are far from unerring, and the NFL Parties' appeal right—and the availability of the AAPs and AAPCs in connection with those appeals—is a necessary check on the payment of otherwise invalid claims. This motion concerns appeals of claims based on diagnoses of four MAF Physicians—Drs. Randolph Evans, Nicholas Suite, Bruce Rubin and Kester Nedd—as to whom the AAPs (in connection with audit work) have provided feedback to the Claims Administrator that these doctors repeatedly have committed material diagnostic errors in the sample of claims the AAP have reviewed, raising serious doubts that claims based on these MAF Physicians' diagnoses are valid under the Injury

[5] While the NFL Parties have no ongoing contact with MAF Physicians, that is not the case with lawyers for claimants. On information and belief, certain claimants' counsel have gone so far as to draft affidavits and letters for MAF Physicians to sign in connection with claim filings and appeals.

Definitions set forth in the Settlement Agreement. Indeed, these diagnostic errors and suspect methodologies, among other things, have led the Claims Administrator to disqualify Drs. Evans and Suite from the Settlement Program.[6]

Dr. Suite. Dr. Suite provided diagnoses to 26 retired players, approximately 77% of whom traveled out of state to see him, eight of which related claims remain in audit pending the outcome of various ongoing investigations.[7] In connection with a previous audit investigation into Dr. Suite himself, the Claims Administrator asked an AAP to review six claims supported by Dr. Suite's diagnoses.[8] While not finding evidence of fraud, the AAP concluded that "the CDR scores [Dr. Suite] assigned did not always match the player's reported functional abilities."[9] Based on this feedback, the Claims Administrator expressed that he was "concerned about those potential flaws in Dr. Suite's MAF diagnoses," but reasoned that these concerns were "ones of clinical judgment and compliance with medical and Settlement Agreement diagnostic criteria . . . to be dealt with in the claims process," rather than the audit process.[10] In other words, the Claims Administrator stated that the appeals process was the proper vehicle to rectify the diagnostic errors observed by the AAP. Ultimately, the Claims Administrator terminated

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6 We understand that, given the ongoing concerns about the diagnostic work of numerous MAF Physicians, the Special Masters and Claims Administrator are discussing ways that the Claims Administrator, with the assistance of the AAPs and AAPCs, might provide more quality control and oversight of the diagnostic work of the MAF Physicians and better educate them on the Settlement Agreement's Injury Definitions.

7 Dr. Suite also provided Diagnosing Physician Certification Forms for 38 retired players for whom he reviewed medical records but did not personally examine, which the Claims Administrator disallowed as contrary to the requirements of the Settlement Program.

8 The Claims Administrator did not tell the Parties which particular claims were reviewed by an AAP.

9 The National Alzheimer's Coordinating Center's Clinical Dementia Rating ("CDR") scale is used to measure functional impairment in the areas of Community Affairs, Home & Hobbies, and Personal Care, and is an evaluative component set forth in the Settlement Agreement's Injury Definitions for Level 1.5 and 2 Neurocognitive Impairment. (*See* Settlement Agreement, Ex. 1 at 2-3.)

10 Mar. 29, 2018 email from Orran Brown to Parties, attached as Ex. 1 (redacted).

Dr. Suite from continued participation as a Qualified MAF Physician in the Settlement Program.

The NFL Parties have appealed six claims based on Dr. Suite's diagnoses—including on the very issue of his assignment of CDR scores that do not match the player's reported functional impairment. The Special Master recently denied the NFL Parties' appeals on two of these claims (SPIDs 100002712 and 100016955) without consulting an AAP; another three appeals remain pending with the Special Master. The NFL Parties seek reconsideration of these two recently denied appeals with the assistance of an AAP, and submit that, in view of the red flags raised by the AAP to the Claims Administrator with respect to Dr. Suite, it would be an abuse of discretion for the Special Master not to avail himself of the assistance of an AAP in connection with the three remaining appeals (as well as any further appeals raising technical medical issues) arising from Dr. Suite's diagnoses.

Drs. Rubin and Nedd. Drs. Rubin and Nedd have provided diagnoses to 29 retired players, approximately 45% of whom traveled out of state to see them, eight of which related claims remain in audit pending the outcome of various ongoing investigations. In connection with a previous audit of Drs. Rubin and Nedd, the Claims Administrator sent four claims supported by these MAF Physicians' diagnoses (two by each physician) to an AAP for review.[11] According to the Claims Administrator, the AAP concluded "that in three of the claims, the players likely misrepresented their cognitive impairments and the AAP member would deny the claims," and on the fourth claim the AAP would downgrade the diagnosis from Level 2 to Level 1.5. In addition, the AAP found that Drs. Rubin and Nedd "did not adequately apply CDR methods or

[11] The Claims Administrator did not tell the Parties which particular claims were reviewed by an AAP.

scoring algorithms to properly assign Injury Definition diagnoses," were "overly reliant on self-report," and "did not document critical evaluation of the validity or accuracy of neuropsychological reporting of cognition and function."[12] Again, however, in the absence of any finding of fraud, the Claims Administrator let the claims proceed so that these diagnostic issues could be addressed on appeal.

The NFL Parties have appealed eight claims involving diagnoses by Drs. Rubin and Nedd, and the Special Master recently has decided five of them without consulting with an AAP or AAPC (SPIDs 100004715, 100008030, 100008258, 100013190, and 950003710), while one appeal remains pending before the Special Master and two other appealed claims are now in audit. The NFL Parties seek reconsideration of the decided appeals with the assistance of an AAP—which appeals raise precisely the same questions of CDR scoring and performance validity testing faulted by the AAP—and respectfully submit that, in view of the red flags identified by the AAP to the Claims Administrator with respect to Drs. Rubin and Nedd, it would be an abuse of discretion for the Special Master not to avail himself of the assistance of an AAP in connection with the remaining pending appeal (as well as any further appeals raising technical medical issues) arising from Dr. Rubin's or Dr. Nedd's diagnoses.

Dr. Evans. Dr. Evans is in a league of his own. He has rendered 114 Qualifying Diagnoses (94 in the MAF) and is singularly responsible for 30% of all Qualifying Diagnoses rendered by the 140 MAF Physicians—a staggering percentage. Over 50% of the retired players diagnosed by Dr. Evans traveled out-of-state to see him (as opposed to seeing MAF Physicians located much closer to them geographically—an immediate red flag), and 67 claims supported by Dr. Evans' diagnoses remain in audit pending further

[12] June 29, 2018 Notice of Conclusion of Audit, attached as Ex. 2 (redacted).

investigation. In fact, the Claims Administrator informed the Parties on several occasions that, based on audit work performed in consultation with the AAP, the Claims Administrator had significant concern that Dr. Evans had regularly misapplied the CDR in a manner that allowed him to render Qualifying Diagnoses that otherwise would not be supported.[13] Ultimately, the Claims Administrator terminated Dr. Evans from the Settlement Program based on "his questionable methodologies, disregard of Program rules and refusal to cooperate or even discuss things with [the Claims Administrator]."[14]

Since his termination, Dr. Evans has made clear his emphatic disagreement with the Settlement Agreement's diagnostic criteria, including its use of the CDR instrument. (*See* D. Hurley, *For Your Patients-Concussion: Why Some Neurologists Are Calling 'Foul' Over Criteria for NFL Concussion Settlement*, Neurology Today, Oct. 4, 2018 (protesting the Settlement Agreement's diagnostic criteria, including its use of the CDR in evaluating functional impairment).) But Dr. Evans' disagreement with the bargained-for diagnostic standards set forth in the Settlement Agreement does not excuse his failure to follow them.

Of the 17 appeals at issue here, ten involve diagnoses by Dr. Evans where the Special Master did not consult an AAP or AAPC.[15] The NFL Parties seek reconsideration of these 10 appeals—most of which raise precisely the same questions of CDR scoring faulted by the AAP—with the assistance of an AAP/AAPC and respectfully submit that, in view of the red flags identified by the AAP to the Claims Administrator,

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[13] The Claims Administrator did not tell the Parties which particular claims were reviewed by an AAP.

[14] *See* Oct. 17, 2018 email from Orran Brown to Parties, attached as Ex. 3 (redacted).

[15] SPIDs 100000070, 100002497, 100003221, 100004486, 100004758, 100005721, 100006765, 100009422, 250002398, and 950000043. The NFL Parties have brought nineteen additional claim appeals involving Dr. Evans' diagnoses but sixteen of those claims are now in audit and one is pending before the Special Master. These additional appeals should be reviewed by an AAP at the appropriate time.

as well as the disproportionate volume of Qualifying Diagnoses and out-of-state travel by retired players, it would be an abuse of discretion for the Special Master not to avail himself of the assistance of an AAP in connection with the remaining appeals (as well as any further appeals raising technical medical issues based on Dr. Evans' diagnoses).

C. AAP Reasoning in Claim Denials for pre-Effective Date Claims Confirms the Merit of the NFL Parties' Appeals and the Need for AAP Consultation on Appeal

Not only do the general criticisms already levied by the AAPs with respect to these MAF Physicians' methodologies and diagnoses raise red flags, but existing AAP decisions denying pre-Effective Date claims confirm the merit of the NFL Parties' appeals and underscore the need for AAP/AAPC consultation on these appeals.

As noted above, a consistent diagnostic error identified by AAPs when they reviewed a subset of claims supported by diagnoses of Drs. Suite, Rubin, Nedd and Evans (at the Claims Administrator's request and in connection with various audits) was that these MAF Physicians misapplied the CDR, such that the CDR score applied was wholly inconsistent with the functional abilities of the former player. AAPs have denied pre-Effective Date claims (AAP review is compulsory on the initial claim determination of such claims) for the very same misapplication of the CDR that the NFL Parties have raised in these appeals. For example, a CDR score of 2.0 in Community Affairs (which might support a Qualifying Diagnosis of Level 2 Neurocognitive Impairment) requires that a person have "no pretense of independent function outside home." (*See* CDR Worksheet, attached as Ex. 4.) Thus, AAPs have rejected diagnosing physicians' CDR scores of 2.0 in Community Affairs where a retired player had "the ability to drive independently" and "perform volunteer duties for church" or "volunteer[] as a coach for a High School football team" (*see* Doc. Nos. 159462, 172128), and where a retired player

"manages his finances, lives alone, drives, and has a 'rental business" (*see* Doc. No. 172329).

But precisely the same diagnostic errors are present in the claim appeals at issue here, which did *not* undergo AAP review in connection with the initial claim determination (because they are MAF Physician claims) or on appeal (because the Special Master failed to consult an AAP). For example, Dr. Evans assigned a CDR score of 2.0 to SPID 100002497 (a retired player in his early 40s seeking $3 million for Level 2 Neurocognitive Impairment), even though the retired player denied any difficulty with driving and was CEO of an athletic training company employing twelve staff members. In addition, social media posts brought to the Special Masters attention on appeal demonstrate that this retired player continues to ski, cook, and host golf tournaments and NFL viewing parties for fans. Dr. Evans' conclusion that this player merited a CDR score of 2.0 in Community Affairs (reflecting "no pretense of independent function outside home") is squarely inconsistent with the repeated rulings of the AAP, and providing a $3 million Monetary Award for Level 2 Neurocognitive Impairment to a player with this level of functional ability makes a mockery of the Settlement Program. Of the 17 claim appeals at issue here, the NFL Parties appealed 13, at least in part, based on clearly erroneous CDR scoring of this ilk.[16]

In addition, in connection with prior reviews of pre-Effective Date claims, AAPs/AAPCs have provided guidance on when claims should be denied because the performance validity metrics in the neuropsychological testing reflects malingering and

[16] By way of further examples, Dr. Evans assigned a CDR score of 2.0 in Community Affairs to SPID 100004486 despite the retired player being employed as a medical recruiter, continuing to drive and serving as the president of a non-profit (*see* Doc. No. 169561), while Dr. Suite assigned the same CDR score of 2.0 to SPID 100016955 who had recently incorporated multiple businesses, attended and spoke at football games and events, and volunteered to renovate a local shelter (*see* Doc. No. 169082).

invalidates a diagnosis. For example, an AAP (in consultation with an AAPC) denied a claim for Level 1.5 Neurocognitive Impairment "due to . . . detection of sub-optimal effort or malingering on multiple performance validity tests." (*See* Doc. No. 167687.) Similarly, an AAP denied a claim for Level 1.5 Neurocognitive Impairment "because of extremely low scores on two validity measures suggesting suboptimal effort and invalid performance, and insufficient explanation [was] provided for discrepancies and inconsistencies in the test scores." (*See* Doc. No. 166325.) The AAP who reviewed a subset of claims supported by Drs. Rubin's and Nedd's diagnoses specifically faulted the doctors with respect to their evaluation of performance validity and determined that, in three of the four cases reviewed, "the players likely misrepresented their cognitive impairments and the AAP member would deny the claims."[17] Among the appeals at issue here is an appeal of Dr. Rubin's Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment despite the fact that the retired player failed four of seven performance validity metrics in a manner that clearly demonstrated malingering (SPID 950003710). This type of appeal requires the expertise of the AAPs and, particularly, the AAPCs, who are familiar with the intricate issues involved in performance validity testing. (*See also* NFL Parties' appeals regarding SPIDs 100000070, 100002497, and 100013190 (raising performance validity issues).)

These examples illustrate the critical importance of AAP and AAPC review of medical records when an appeal turns on medical arguments that highly-trained neurologists and neuropsychologists can assist the Special Master to interpret properly. The expectation was that the Court (or the Special Master) would exercise its discretion to use this resource when appeals involve technical medical issues beyond the Court's or

[17] June 29, 2018 Notice of Conclusion of Audit, attached as Ex. 2 (redacted).

Special Master's expertise, especially where, as here, the AAP has specifically called into question the diagnostic work performed by the doctors whose diagnoses are at issue.

D. The Special Master's Pattern and Practice of Not Consulting the AAPs/AAPCs

The Special Master has denied 36 out of 37 of the NFL Parties' adjudicated appeals of claims based on Qualifying Diagnoses rendered by MAF Physicians; on information and belief, the Special Master only consulted an AAP or AAPC on the lone NFL appeal he granted. Concerned about this lack of consultation, the NFL Parties wrote several letters to the Special Master urging a re-review of recent appeal determinations with the assistance of the AAPs and AAPCs where the NFL Parties' appeal turned on technical medical issues and the Monetary Award had not yet been paid.[18]

In those letters, the NFL Parties pointed out that AAP determinations in connection with pre-Effective Date appeals—particularly concerning CDR scoring and performance on cognitive screening and performance validity tests—clearly establish the merits of the NFL Parties' appeals and the invalidity of the diagnoses, and underscored the need for the Special Master to consult with the AAPs/AAPCs on such appeals. (*See, e.g.*, Ex. 5 at 3-5.) The NFL Parties also highlighted to the Special Master that the vast majority of the recent appeal denials involved diagnoses by MAF Physicians whose diagnostic practices had been sharply criticized by the AAP in connection with their audit work. The NFL Parties detailed the criticisms raised by the AAPs with respect to Drs. Suite, Rubin, Nedd and Evans, and explained how the NFL Parties' appeals of claims based on these doctors' diagnoses, and denials by the Special Master without consultation

[18] *See* June 28, 2018 Letter from Bruce Birenboim to Special Master Wendell Pritchett (Ex. 5); July 11, 2018 Letter from Bruce Birenboim to Special Master Wendell Pritchett (Ex. 6); and Aug. 28, 2018 Letter from Bruce Birenboim to Special Master Wendell Pritchett (Ex. 7) (redacted).

with the AAP/AAPC, had raised precisely the same diagnostic issues on which AAP members had previously found these doctors to be in error. (*See* Ex. 7 at 2-4.)

E. The Special Master AAP Ruling

The Special Master AAP Ruling denied the NFL Parties' request for a re-review, with AAP/AAPC assistance, of recent NFL Parties' appeals that turned on technical, medical issues. The Special Master held that "compulsory AAP/AAPC review [of claims that turn on the sufficiency of medical evidence] is not required by the Settlement Agreement." (AAP Ruling at 1.) The Special Master stated that "compulsory review" of all such claims by AAPs and AAPCs would "burden Settlement Class Members with an additional requirement for approval of claims beyond the requirements set forth in the Settlement Agreement." (*Id*. at 2.) The Special Master concluded that "[t]he Settlement Agreement thus makes clear that the Court – and by extension, the Special Master – has the sole discretion to decide whether to consult an AAP/AAPC before ruling on an appeal." (*Id*. at 1.)

The Special Master did not rule, however, that he should never consult with AAPs and AAPCs in order to gain neutral medical insight when deciding appeals involving Qualifying Diagnoses made by MAF Physicians. Nor did the Special Master offer any views as to the circumstances in which such consultation would be necessary or otherwise appropriate. The Special Master also did not comment on any of the specific issues that formed the basis of the NFL Parties' request for a re-review of certain appeals in consultation with the AAPs and AAPCs, including the various diagnostic mistakes that AAPs had identified with respect to Drs. Suite, Rubin, Nedd and Evans or the AAP denials of pre-Effective Date claims based on virtually identical diagnostic errors as those identified by the NFL Parties as the basis for their appeals.

F. Standard of Review

The Special Master's decision not to consult the AAP/AAPC when deciding these claim appeals, or to re-review these claim appeals with the assistance of the AAP/AAPC, is a procedural matter reviewable for abuse of discretion. *See* Fed. R. Civ. P. 53(f)(5) ("Unless the appointing order establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion."); *see also* Settlement Agreement at § 9.8 (granting Special Master discretion to receive assistance from AAPs and/or AAPCs on claim appeals).

In reviewing for an abuse of discretion, the Court must determine, based on the totality of the circumstances, whether the Special Master's decision not to consult the AAP/AAPCs (either initially or on a re-review) exceeded the limits of the range of reasonable choices appropriate to resolving the matter at issue. *See Loinaz* v. *EG & G, Inc.*, 910 F.2d 1, 7 (1st Cir. 1990) ("There is no neat, standardized test for judging abuse of discretion; each case must be judged on its own facts and circumstances"); *Zervos* v. *Verizon New York, Inc.*, 252 F.3d 163, 169 n.5 (2d Cir. 2001) ("Discretion is said to be 'abused' ('exceeded' would be both a more felicitous and correct term) when the decision reached is not within the range of decision-making authority a reviewing court determines is acceptable for a given set of facts." (internal quotation omitted)); *U.S.* v. *Cunningham*, 694 F.3d 372, 383 (3d Cir. 2012) (district court's rulings are an abuse of discretion if "clearly unreasonable"); *Ferguson* v. *Eakle*, 492 F.2d 26, 29 (3d Cir. 1974) (considering "totality of [] circumstances" in determining that district court abused its discretion). The standard of review applicable to procedural decisions by a Special Master is less deferential than an appellate court's application of an abuse of discretion standard to a trial court's rulings. *See* Fed. R. Civ. P. 53, Special Committee Notes, 2003

Amendment Subdivision (g) ("The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.").

Regardless, this Court expressly retained "continuing and exclusive jurisdiction to interpret, implement, administer and enforce the Settlement Agreement" in accordance with its terms. (Am. Final Order and J. § 17, ECF No. 6534; *see also* Settlement Agreement § 20.1(n).) As such, this Court has the authority to consider and determine the appropriate procedural process for implementing the Settlement Agreement, including any guidelines for the proper discretionary use of the AAP/AAPC on appeals in order to reach an informed medical determination on claims.

ARGUMENT

I. The Special Master's Failure to Consult with the AAP/AAPC on 36 out of 37 Appeals Brought by the NFL Parties With Respect to MAF Physician Diagnoses Reflects an Abuse of Discretion

The goal in making the AAPs and AAPCs available to the Court (and, by extension, the Special Master) in connection with claim appeals was to provide a safeguard that the ultimate determinations would be correct—or at least not clearly wrong—as a matter of medicine. Where a MAF Physician has provided the Qualifying Diagnosis, the Claims Administrator (to date) has not consulted with an AAP/AAPC in connection with the initial claim determination. As a result, these initial claim determinations have been made without any assessment of the medical correctness or reliability of the diagnoses provided or their conformity with the criteria required by the Injury Definitions set forth in the Settlement Agreement. To date, the only possibility of neutral, medical input to evaluate the medical correctness and reliability of diagnoses by

MAF Physicians is if the Special Master exercises his discretion to consult with the AAP/AAPC on a claim appeal.

Of course, there is no question that MAF Physicians are not infallible, although that appears to be an assumption underlying the Special Master's failure to use the AAP/AAPC in connection with appeals of claims supported by MAF Physician diagnoses. Indeed, the history of the Settlement Program thus far indicates that certain MAF Physicians have, according to the AAPs, been using suspect methodologies and repeatedly rendering erroneous diagnoses. The AAPs reached these conclusions in the context of performing audit work at the request of the Claims Administrator, and the Claims Administrator determined that such medical errors should not be addressed in the audit process but instead in connection with the appeals process. However, where, as here, the Special Master has failed to consult with the AAP/AAPC in connection with *36 out of 37* of the NFL Parties' adjudicated appeals of claims based on diagnoses by MAF Physicians, it is not clear how these manifest medical errors by MAF Physicians will be addressed. Without the assistance of the AAP/AAPC in the context of appeals raising technical medical issues (beyond the purview of laypersons) arising from MAF Physicians' diagnoses, it is inevitable that Monetary Awards based on clearly erroneous diagnoses will continue to be paid. If so, the NFL Parties are not receiving the benefit of their bargain, which is particularly prejudicial after the NFL Parties agreed to uncap the Monetary Award Fund.

The NFL Parties have been judicious with respect to appealing claim awards and have done so with respect to only 15% of approved claims, and *only where leading expert medical consultants have concluded that the underlying diagnosis is clearly and*

convincingly wrong. Unsurprisingly, a large percentage of these appeals involve claims supported by diagnoses by the very same MAF Physicians who have been subject to serious criticism by the AAP (and, in certain cases, termination from the Settlement Program). But the material diagnostic errors by these MAF Physicians—already flagged by AAPs in connection with their audit work—have not been corrected on appeal.

The NFL Parties acknowledge that the Settlement Agreement provides the Special Master with discretion in choosing whether to consult with the AAP/AAPC on any particular claim appeal. However, the NFL Parties respectfully submit that the pattern and practice of the Special Master in failing to consult with the AAP/AAPC on *36 of 37 adjudicated claim appeals* brought by the NFL Parties, raising technical medical issues relating to diagnoses by MAF Physicians, on its face reflects an abuse of discretion and is simply not a reasonable choice under the circumstances.

II. The Special Master Abused His Discretion by Failing to Consult AAPs/AAPCs on Diagnoses by MAF Physicians Known to Have Used Suspect Methodologies and/or Made Material Diagnostic Errors

The NFL Parties, again, acknowledge that the Settlement Agreement provides the Special Master with discretion in choosing whether to consult with the AAP/AAPC on any particular claim appeal. However, the NFL Parties respectfully submit that there are categories of appeals where the failure to consult with an AAP/AAPC is not reasonable under the circumstances and thus constitutes an abuse of discretion. One such category is where the diagnosing MAF Physician is known to have been criticized by the AAP (and at times terminated from the Program) for suspect methodologies and erroneous diagnoses. That is the case with respect to each of the 17 NFL appeals at issue here.[19]

[19] At the very least, it would be unreasonable under the circumstance for the Special Master to fail to consult an AAP/AAPC where the NFL Parties' appeal raises precisely the same kind of medical error –

In fact, the Special Master's failure to consult with neutral AAPs and AAPCs has resulted in erroneous appeal determinations that are plainly inconsistent with the reasoning behind denial notices for pre-Effective Date claims that reflect the expert medical views of the AAP/AAPC on the very same diagnostic criteria at issue in these 17 appeals. Had the Special Master received the benefit of that medical expertise on these fundamental diagnostic issues, these erroneous decisions would have been easily avoided.

Moreover, the NFL Parties respectfully submit that there are particular technical medical issues as to which failure to consult with an AAP/AAPC is particularly misguided and unreasonable under the circumstances. For example, the question of whether the performance validity metrics in the neuropsychological tests reflect intentional malingering and a misrepresentation by the retired player of his cognitive abilities is a critical issue for the integrity of the Settlement Program, and it is also a highly technical issue that requires the specific expertise of the AAPC. Unassisted review by the Special Master, a layperson with no expertise in this highly technical area, simply provides no safeguard on appeal. Such questions, we submit, should presumptively have the benefit of AAP/AAPC expertise.

In addition, where a MAF Physician does not apply the specific battery of neuropsychological tests set out in the Settlement Agreement (the current BAP battery) but asserts that the substituted testing and accompanying diagnostic criteria are "generally consistent," the Special Master lacks the expertise to evaluate that assertion. As the AAPCs would explain, the question is highly qualitative, not quantitative. It would not be meaningful for the Special Master to count the number of tests substituted

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for example, CDR scoring or performance validity testing – previously found by the AAP with respect to that same MAF Physician. That would apply to at least 15 of the 17 appeals at issue here.

and deduce that the diagnosis is generally consistent because only 2 out of 5 tests were substituted. Rather, the Settlement Agreement identifies specific, widely accepted and validated tests, which are each meant to assess a very particular type of cognitive impairment in a given domain. The substituted tests may not measure the same types of impairment in a particular domain, or may not be as effective or valid as recognized in the medical community. Thus, the Special Master—by no fault of his own—is simply incapable of meaningfully evaluating whether the testing yields a diagnosis that is nonetheless "generally consistent" with the diagnostic criteria negotiated by the Parties and set forth in the Settlement Agreement for the BAP as meriting compensation.[20]

CONCLUSION

For the reasons set forth herein, the NFL Parties respectfully request that the Court reverse the Special Master AAP Ruling and order the Special Master's re-review of the 17 claim appeals identified herein in consultation with the AAP. In addition, the NFL Parties respectfully request that this Court exercise its explicit authority to give guidance on the implementation of the Settlement Agreement, including the proper discretionary use of the AAP/AAPC on appeals raising technical medical issues beyond the purview of a layperson.

[20] Finally, in separate briefing before the Court, the NFL Parties will be appealing a recent decision of the Special Master finding that, where the precise BAP battery of neuropsychological tests is given, but the diagnosing physician is acting in his MAF rather than BAP capacity, the MAF Physician is entitled to water down the BAP diagnostic criteria requirements and provide a Qualifying Diagnosis that would be unavailable under the BAP, so long as the MAF Physician asserts that the watered down outcome is nonetheless "generally consistent." As the NFL Parties will explain in appealing that separate decision, the Special Master's conclusion is wrong and would lead to highly inequitable results, since retired players with the wherewithal to pay for a MAF diagnosis (rather than taking the free BAP exam) will get the benefit of relaxed diagnostic criteria unavailable to any BAP participant. This result makes no sense. But, in the event this Court were to uphold the Special Master's ruling on this point, the NFL Parties submit that the Special Master would not be able to intelligently determine (without consulting with the AAP/AAPC) whether the test results—clearly *insufficient* under the BAP—are nonetheless "generally consistent" for purposes of a Qualifying Diagnosis.

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Respectfully submitted,

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